STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
Cooper, P.J., Jansen and Danhof, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant, Supreme Court No. 123145

v

TIFFANY FREE LIVELY, Court of Appeals No. 233795

Defendant-Appellee. Presque Isle CC No. 00-91835-FH

_____/

BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED FOR REVIEW

I. **The term "material" is not used in the Michigan perjury statutes, MCL 750.422; MCL 750.423. The materiality requirement that a false oath or testimony be material to the proceeding in which the testimony was received is a judicially imposed requirement. Is this judicially imposed requirement a threshold requirement that must be determined by the trial judge as a matter of law rather than an element of the offense of perjury that must be decided by the jury beyond a reasonable doubt?**

II. **Assuming that this Court determines that materiality is an element of the offense of perjury under MCL 750.422; MCL 750.423, that must be decided by the jury, was the trial court's failure to submit the question of materiality to the jury harmless error under either the plain error doctrine, or harmless beyond a reasonable doubt standard?**

STATEMENT OF PROCEEDINGS AND FACTS

Tiffany Free Lively was tried before a Presque Isle Circuit Court jury on one count of perjury in a court proceeding, a 15-year felony under MCL 750.422.

At several points during the proceedings the defendant moved for dismissal of the charges because the matters on which she had allegedly given false testimony were not "material" to the proceedings in which the testimony was given. The judge ruled that the testimony was material, as a matter of law, and that no further argument on that issue was necessary (Motion to Quash Transcript pp 3-4; 26-27a.) The defendant did not object to the court's plan to give the jury the standard instruction, which does not submit the issue of materiality to the jury, CJI2d 14.1, and she did not offer a proposed instruction on materiality. She did, however, propose a specific intent instruction under CJI2d 3.9 that added the words "on a material matter." The proposed instruction read:

> For the crime of perjury this means that the prosecution must prove that the defendant intended to make false statement under oath **on a material matter** by testifying that she had not been served with divorce papers and/or that she had no knowledge that there was a divorce pending. (Emphasis added) (46a).

The prosecutor objected to defendant's proposed instruction because it included language regarding "a material matter," and the trial court struck that language from the proposed instruction because "[t]hat is an issue of law for the Court which I have already decided, so that would not be appropriate." (T II, 315-316; 48a.) The trial court then decided to accept the prosecutor's proposed specific intent instruction on CJI2d 3.9 (T II, 315-316; 48a.), which read:

> . . . that the defendant intended to falsely testify that
> a) she had not been served with divorce papers,
> b) and/or she had no knowledge that there was a divorce pending. [47a]

That was the extent of the defendant's attempt to instruct the jury on materiality. The defendant offered no other instruction on a definition of materiality.

The jury found defendant guilty (T II, 378; 55a.)

The trial court sentenced defendant to two years probation on February 12, 2001 (Sentencing Transcript p 9; 56a.)

The defendant pursued an appeal of right to the Court of Appeals. On December 3, 2002, that court reversed her conviction, holding, in a published opinion, that failure to permit the jury to determine the issue of materiality deprived her of her right to a jury trial under the Sixth Amendment to the Constitution of the United States. *People v Lively*, 254 Mich App 249, 252-253; 656 NW2d 850 (2002). (8-9a.)

The People filed a timely motion for rehearing, that asked the court to determine whether "materiality" is an element of the offense (the parties and the court had, until that time, assumed that it was an element) that must be decided by the jury. The motion for rehearing was denied on January 15, 2003. (11a)

Facts

The facts comprising the criminal offense are uncomplicated.

Tiffany Free Lively was a defendant in divorce proceedings in Presque Isle Circuit Court, *Christopher F. Lively v Tiffany F. Lively*, no 99-0011835. A default judgment of divorce was entered against her. She moved to have the judgment set aside. In the hearing on that motion she claimed that she was unaware of the divorce proceedings and that the divorce complaint had never been served upon her (T I, 123-128; 33-35a; People's trial exhibit 5; 14-15a.).

The prosecutor charged Lively with one count of giving false testimony in a court proceeding, MCL 750.422. The elements of 1) false testimony given 2) intentionally 3) in a

court proceeding while 4) under oath were proved to the satisfaction of the jury, through the testimony of David Elder, the attorney representing defendant's husband in the divorce proceeding (T I, 102-128; 28-35a) process server Office Matthew Torongeau (T I, 144-148; 36-37a), and Friend of the Court caseworker Rosalyn Boyer (T I, 178-193; 38-42a).

ARGUMENT

I. The judicially imposed requirement that a false oath or testimony be material to the proceeding in which the testimony was received is not an element of the crime of perjury that must be determined by the jury, but instead is a threshold requirement that must be determined by the trial judge.

A. Preservation of issue and standard of Review

This issue was not covered in the initial briefing in the Court of Appeals but the People raised it in a motion for rehearing.

Whether a "requirement" that a false statement have been material to the proceeding in which the testimony was received is an element of the crime of perjury is an issue of law. Issues of law are reviewed *de novo*. *People v Mass,* 464 Mich 615, 622; 628 NW2d 540 (2001); *People v Krueger*, 466 Mich 50, 53; 643 NW2d 223 (2002); *People v Carlson*, 466 Mich 130, 136; 644 NW2d 704 (2002).

B. Discussion

Defendant Tiffany Lively sought to have a default judgment of divorce set aside in the Presque Isle Circuit Court. In testimony under oath and affidavit, she asserted, falsely, that she had never been served with the divorce papers and had no knowledge of the divorce proceedings. The prosecutor charged her with and a jury convicted her of one count of perjury in a court proceeding, a 15-year felony contrary to MCL 750.422.

In her perjury trial, the trial judge determined that the matters to which she testified at the hearing to set aside the default divorce judgment were material to that proceeding. (T II, 208-215; 43-44a.) The judge did not submit the question of the materiality of the defendant's false swearing to the jury in compliance with *People v Hoag,* 113 Mich App 789, 797; 318 NW2d 579 (1982), *lv den* 417 Mich 896 (1983) and *People v Noble*, 152 Mich App 319, 326-327; 393 NW2d 619 (1986).

The Court of Appeals reversed the defendant's conviction because materiality is an element of MCL 750.422, and the Fifth and Sixth Amendments of the United States Constitution entitle a criminal defendant to a jury determination of every element of the crime charged (citing *United States v Gaudin*, 515 US 506; 115 S Ct 2310; 132 L Ed 2d 444 (1995). (254 Mich App at 250-251; 8-9a.)

Prior to the instant case, no Michigan court has confronted the issue of whether "materiality" is an element of the offense of perjury under either MCL 750.422 or MCL 750.423, that must be proved to the trier of fact beyond a reasonable doubt, as opposed to a gateway requirement that must be decided by the trial court judge. Descriptions of materiality as an "element" in cases such as *People v Hoag, supra*; *People v Jeske*, 128 Mich App 596, 604 n 4; 341 NW2d 778 (1983), are not dispositive because those cases also state that the issue of materiality is to be decided by the court, rather than by the jury (*Id.* at 798). A "true" element could only be decided by the jury in a jury trial. *United States v Gaudin*, 515 US 506, 510, 511; 115 S Ct 2310; 132 L Ed 2d 444 (1995).

In *Gaudin*, the United States Supreme Court held that in a prosecution for making a false statement in a Department of Housing and Urban Development loan document under 18 USC § 1001, the trial court's refusal to submit the question of materiality to the jury violated the defendant's constitutional right to have the jury determine guilt on every element of the crime charged. The Court in *Gaudin* noted that the government conceded that 18 USC § 1001 has a materiality requirement and that materiality is an element of the offense. 515 US at 509, 523 (Rehnquist, CJ concurring). The People in the instant case do not concede that materiality is an element of the offense of perjury under MCL 750.422 and MCL 750.423.

At common law, perjury was committed when one who has been administered an oath in any judicial proceeding has sworn falsely in any matter material to the issue or cause in question.

People v Fox, 25 Mich 492, 496 (1872). As summed up by Justice Cooley, perjury at common law required that "[t]here must be an oath authorized by law, an issue or cause to which facts were material, and a false statement regarding such facts upon such issue or in such cause." *Id.* at 496-497.

Conversely, the perjury statutes in Michigan, unlike those of most other jurisdictions, do not mention the term "material," or require proof of materiality. The statutes in question, MCL 750.422 and MCL 750.423, derive from RS 1846, Ch 156 §§ 1 and 2 respectively, and were incorporated with only stylistic changes into the Michigan Penal Code, 1931 PA 328. These statutes have never contained any language using the term "material" or anything comparable. Rather, the courts have construed a materiality requirement into the statutes. The oft-quoted rule that the materiality of a false swearing under the perjury statutes (MCL 750.422; MCL 750.423) must be pleaded and proved is therefore a judicially engrafted rule.[1]

MCL 750.422 provides:

> Any person who, being lawfully required to depose the truth in any proceeding in a court of justice, shall commit perjury shall be guilty of a felony, punishable, if such perjury was committed on the trial of an indictment for a capital crime, by imprisonment in the state prison for life, or any term of years, and if committed in any other case, by imprisonment in the state prison for not more than 15 years.

Perjury is defined in MCL 750.423:

> Any person authorized by any statute of this state to take an oath, or any person of whom an oath shall be required by law, who shall wilfully swear falsely, in regard

[1] Numerous perjury related offenses also do not, on their face, have a materiality requirement. See *e.g.*, MCL 750.422; MCL 750.423; MCL 29.7; MCL 35.929; MCL 38.422; MCL 168.808; MCL 168.933; MCL 324.61734; 338.845; MCL 324.61511; MCL 442.219; MCL 768.19. Other perjury related offenses do use the term "material" in the statute. Most relevant here is MCL 257.254, "knowingly mak[ing] any false statement of a material fact" in an application for title for motor vehicle. Despite this explicit inclusion of the term "material fact" in the statute, the Court of Appeals in *People v Noble*, 152 Mich App 319; 393 NW2d 619 (1986) characterized materiality as "an issue for the court to decide," rather than an element of the offense that must be decided by the jury. *Id.*, at 327. See also *e.g.*, MCL 324.5531; MCL 500.2014; MCL 600.8813; MCL 764.1e(2); MCL 768.1e(2).

> to any matter or thing, respecting which such oath is authorized or required, shall be guilty of perjury, a felony, punishable by imprisonment in the state prison not more than 15 years.

The Legislature in MCL 750.422 and MCL 750.423 statutorily established the elements of the offense of perjury in derogation of the common law elements for perjury, but did not include "material" or "materiality" as an element of the offense of perjury. The statute is unambiguous. Based on the clear language of the statute, the crime of perjury is complete when a person willfully swears falsely in regard to any matter or thing to which an oath is authorized or required, regardless of the materiality of such matter to an issue before the court. The statute demonstrates the intent of the Legislature to enlarge the scope of the crime of perjury beyond the common law elements of the offense, and to eliminate the common law element of perjury. See *Beckley v State*, 443 P2d 51, 54-55 (Alas 1968); *Nelson v State*, 546 P2d 592, 594 (Alas, 1976)[2]; *State v Miller*, 26 RI 282, 285-286; 58 A 882 (1904)[3]; *State v Byrd*, 28 SC 18, 21; 4 SE 793 (1888)[4]. In each of these cases, the Legislature enacted perjury statutes in derogation of the

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[2] The Alaska perjury statute read:

> A person authorized by law to take an oath or affirmation, or a person whose oath or affirmation is required by law, who willfully and falsely swears or affirms in regard to a matter concerning which an oath or affirmation is authorized or required, is guilty of perjury.

[3] The Rhode Island perjury statute read:

> Every person of whom an oath or affirmation is or shall be required by law, who shall willfully swear or affirm falsely in regard to any matter or thing respecting which such oath or affirmation is or shall be required, shall be deemed guilty of perjury."

[4] The South Carolina perjury statute read:

> Whoever shall wilfully and knowingly swear falsely, in taking any oath required by law and administered by any person directed or permitted by law to administer such oath, shall be deemed guilty of perjury, and, on conviction, incur the pains and penalties of that offence.

common law that did not contain any reference to materiality. These courts held that the Legislature's omission of materiality from the statute precluded judicial construction to impute a materiality element into the statute.

The Legislature has express constitutional authority to change the common law, which remains in effect in this state until changed, altered or repealed. Const, 1963 art 3 § 7. *Donajkowski v Alpena Power Co*, 460 Mich 243, 256 n 14; 596 NW2d 574 (1999). "[T]he common law does not remain in force if it appears that the rule has been changed by statute." *Boyer v Backus*, 282 Mich 701, 704; 280 NW 756 (1937).

In construing a statute, a court must ascertain and effectuate the Legislature's intent. *Donajkowski, supra* at 248. "If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Id.* "Courts may not speculate regarding legislative intent beyond the words expressed in a statute," and "nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). See also *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999).

> These traditional principles of statutory construction thus force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility. Any other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences. [*McIntire, supra.*]

The development of the substantive criminal law is properly a matter for the Legislature. *In re Lamphere*, 61 Mich 105, 109 (1886); *People v Maffett*, 464 Mich 878, 897 n 20; 633 NW2d 339 (2001) (Corrigan, CJ dissenting). "It is manifestly the function of the Legislature, and not

the courts, to define illegal conduct." *Maffett, supra* at 898 (Corrigan, CJ dissenting) (citing *Lamphere* at 108).

Judicial decisions, however, erroneously read a materiality requirement into the MCL 750.422 and MCL 750.423 despite their unambiguous and plain meaning. See *e.g.*, *People v McCaffrey*, 75 Mich 115, 124, 126 (1889); *People v Ostrander*, 110 Mich 60, 61 (1896); *People v Almashy*, 229 Mich 227, 230; 201 NW2d 231 (1924); *People v Kert*, 304 Mich 148, 154-155; 7 NW2d 251, 253 (1943).

> While perjury under section 423 of the Michigan penal code, 3 Comp. Laws 1929, § 16564, as reenacted by Act No. 328, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 17115-423, Stat. Ann. § 28.665), is defined as a wilful false swearing in regard to any matter or in respect to which such oath is authorized or required, it is always necessary to show that the perjury was in regard to a material fact. See 2 Gillespie's Michigan Criminal Law and Procedure, p. 1901, § 1669, and cases cited therein. [*People v Kert, supra* at 154-155]

Moreover, neither of Michigan's two other statutes dealing with perjury indictments requires that materiality be averred. MCL 767.73 provides:

> An indictment for perjury or for subornation of, solicitation, or conspiracy to commit perjury, is sufficient which indicates the offense for which the accused is prosecuted, the nature of the controversy in respect of which the offense was committed and before what court or officer the oath was taken or was to have been taken, without setting forth any part of the records or proceedings with which the oath was connected, and without stating the commission or authority of the court or other authority before whom the perjury was committed or was to have been committed or the form of the oath or affirmation or the manner of administering the same.

MCL 767.44 authorizes a short form indictment for perjury and provides in pertinent part:

> The following forms may be used in the cases in which they are applicable but any other forms authorized by this or any other law of this state may also be used:
>
> * * *
>
> Perjury--A. B. appeared as a witness in a case between C. D. and E. F. being heard before the (set forth the tribunal) and committed perjury by testifying as follows: (set forth the testimony).

Despite the plain language of MCL 767.44 and MCL 767.73, judicial decisions have held that the materiality of the false swearing to the matter in question must be alleged in the information, or else it must clearly appear so from the statements alleged to be false. *People v Collier*, 1 Mich 137, 138 (1848); *Hoch v People*, 3 Mich 552, 554 (1855); *Flint v People*, 35 Mich 491, 493 (1877); *People v Vogt*, 156 Mich 594, 595-596; 121 NW 293 (1909); *People v Cash*, 388 Mich 153, 158-159; 200 NW2d 83 (1972); *People v White*, 411 Mich 366, 384; 308 NW2d 128 (1981).

Accordingly, because the Legislature clearly and unambiguously indicated its intent to eliminate the common law element of materiality from the statutory offense of perjury as defined in MCL 750.423, there is no room for judicial construction to construe the common law element of materiality into the statute. Judicial decisions that have done so operated without authority in violation of the separation of powers doctrine under the Michigan Constitution. Const 1963, art 3 § 2. The upshot is that "materiality" is not an essential element of the offense of perjury in Michigan.

Chief Justice Rehnquist's concurring opinion in *Gaudin, supra* (joined by Justices O'Conner and Breyer), additionally gives guidance on how to determine whether materiality is an essential element of the offense, or is a judge-made limitation designed "to exclude trifles from its coverage." *Gaudin, supra*, 515 US at 524. Chief Justice Rehnquist first noted that the Court never had to decide whether materiality is an essential element of 18 USC § 1001, but rather rested on the government's concession that materiality is an element of that offense that the government must prove in order to sustain a conviction. *Id.* at 523. The Chief Justice then remarked that "the government's concessions have made this case a much easier one than it might otherwise have been." *Id.* at 524.

The concurring opinion observed that whether "materiality" is an element of every offense under 18 USC § 1001 "is not at all obvious from its text." Id. 18 USC § 1001 reads:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device **a material fact**, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $ 10,000 or imprisoned not more than five years, or both. (Emphasis added)

The term "material" is notably absent from the second clause of the statute. The Chief Justice then noted that the Court's opinion did not resolve the conflict among the Courts of Appeals over whether materiality is an element under 18 USC § 1001, but rather merely assumed that it was an element under the false statement clause of § 1001. *Id.* Some courts have held that while materiality is not an explicit requirement under the second, false statements clause of 18 USC § 1001, there is "a judge-made limitation of materiality in order to exclude trifles from its coverage." *Id.* Other courts have determined that materiality is not an element of the second, false statements clause of 18 USC § 1001. *Id.*

The concurring opinion asserted that the Legislature's definition of the elements of the offense is dispositive in determining what facts must be proven beyond a reasonable doubt:

> "In determining what facts must be proved beyond a reasonable doubt the [legislature's] definition of the elements of the offense is usually dispositive." *McMillan v Pennsylvania*, 477 US 79, 85, 91 L Ed 2d 67, 106 S. Ct 2411 (1986). Nothing in the Court's decision stands as a barrier to legislatures that wish to define--or that have defined--the elements of their criminal laws in such a way as to remove issues such as materiality from the jury's consideration. We have noted that "'the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.'" *Staples v United States*, 511 US 600, 604, 128 L Ed 2d 608, 114 S Ct 1793 (1994) (quoting *Liparota v United States*, 471 US 419, 424, 85 L Ed 2d 434, 105 S Ct 2084 (1985)); see also *McMillan, supra*, at 85. Within broad constitutional bounds, legislatures have flexibility in defining the elements of a criminal offense. See *Patterson v New York,* 432 US 197, 210, 53 L Ed 2d 281, 97 S Ct 2319 (1977).

The complete absence of any mention of or reference to materiality in MCL 750.422 and MCL 750.423 is the strongest evidence that materiality is not an essential element of those offenses that must be proven by the prosecution beyond a reasonable doubt. As demonstrated previously, the judicial gloss of "materiality" upon MCL 750.422 and MCL 750.423 was an unauthorized usurpation of legislative authority. Hence, the judicially imposed materiality requirement can, at best, rise only to the level of a judge-made limitation designed to "exclude trifles from its coverage," rather than an essential element that must be proven by the prosecution beyond a reasonable doubt.[5] This determination is the province of the trial court rather than the jury, which decides only whether the prosecution has proven each of the essential elements beyond a reasonable doubt.

While the judiciary has abrogated the Legislature's function of changing the substantive law, it has never opined that the materiality requirement was an essential element of the offense of MCL 750.422 and MCL 750.423 that must be decided by a jury. Rather, the rule historically has been that the issue of materiality is for the trial court to decide as a matter of law. See *Materiality of testimony forming basis of perjury charge as question for court or jury in state trial*, 37 ALR 4th 948, § 2a (1985); 60A Am Jur 2d, Perjury § 91.

> Michigan follows the majority rule. *Hoag, supra*, 113 Mich App at 798, 798:
>
> > Early Michigan cases establish that the issue of materiality is one for the trial court and not the jury. *People v McElheny*, 206 Mich 51, 59; 172 NW 546 (1919), *People v Almashy*, 229 Mich 227, 230-231; 200 NW 231 (1924). However, defendant argues that the Supreme Court changed this rule in *People v Kert*, 304 Mich 148; 7 NW2d 251 (1943). In that case, the trial court allowed the issue of materiality to go to the jury. The Supreme Court found no error because the

[5] Even a judicially created rule to determine a threshold of materiality to "exclude trifles" from the coverage of the perjury statute would run afoul of the Separation of Powers Doctrine, Const 1963, art 3, § 2. Since materiality is not an element of statutory perjury and the prosecutor is vested with the sole discretion of whether to initiate any criminal prosecution that come within the purview of the statute, any judicial screening of cases to weed out instances of allegedly insignificant false swearing would usurp the prosecutor's charging discretion.

> record showed that the trial court thought the statement was material. *Id.*, 155. While the language cited by defendant might be interpreted as leaving the question of who decides whether the perjured statement is material unsettled, other language in Kert makes it clear that the issue is to be decided by the trial court. The Supreme Court stated:
>
> "The trial judge permitted the introduction of testimony as heretofore outlined. He had to pass upon the materiality of questions when propounded." *Id.*, 154. _
>
> Under Michigan law, the trial court, not the jury, is responsible for deciding the issue of materiality.

4 Gillespie, Michigan Criminal Law & Procedure (2nd ed), § 117:6, p 12, also cites a case from 1869 in support of the proposition that the materiality question must be determined by the trial court. *People v Jones*, 1 Mich NP 141 (Cir Ct 1869).

Several appellate courts in other states have held, post-*Gaudin*, that materiality is not an element that has to be proved beyond a reasonable doubt and determined by the jury: *State v Rollins*, 264 Kan 466; 957 P2d 438 (1998) (despite language in Kansas perjury statute, K.S.A. 1992 Supp. 21-3805, that uses term "material matter," Kansas Supreme Court held that materiality is not an element of the crime of perjury, and the question is one for the trial court alone to decide). *Vargas v State*, 795 So2d 270, 272 (Fl App, 3rd Dist 2001) ("'materiality' is not an element of the crime of perjury in Florida but is a threshold issue that a court must determine as a matter of law prior to trial"); *State v Rollins*, 264 Kan 466, 474; 957 P2d 438 (1998); *Commonwealth v Stallard*, 958 SW2d 21, 25 (Ky., 1997); (statute, KRS 523.010(1) states that "[w]hether a falsification is material in a given factual situation is a question of law" which Kentucky Supreme Court holds "should, on a case by case basis, be left to the sound judgment of Kentucky's trial court judges"); *Hammett v State,* 797 So2d 258, 262 (Miss Ct App 2001) (statute, Miss Code Ann § 97-9-59 specifies that testimony must be on a material matter; appellate court holds that "[t]he question of materiality in a perjury case is one for the trial judge to answer, not the jury").

This Court should therefore determine that the Legislature did not intend to create an element of materiality when it enacted the perjury statutes in Michigan. It should also determine that the judicially created materiality requirement is not a substantive element that must be decided by a jury, but rather a threshold requirement that is addressed only by the trial court. If this Court does decide to retain the materiality requirement as a threshold issue of law addressed by the trial court, it would not violate the holding in *Gaudin, supra* because materiality is not an essential element of the substantive crime of perjury.

II. Assuming that this Court determines that materiality is an element of the offense of perjury under MCL 750.422; MCL 750.423, it must then decide whether the defendant had properly preserved an objection to the trial court's failure to submit the question of materiality to the jury. If the defendant had not properly preserved an objection, then the error in not instructing the jury was harmless under the plain error doctrine. If defendant had properly preserved an objection, then the People established that any error in not permitting the jury to determine the issue of materiality was harmless beyond a reasonable doubt.

A. Standard of Review

In the Court of Appeals the People preserved the issue of harmless error in their brief on appeal. The People there contended that because the defendant failed to object to the trial court's omission to submit the question of materiality to the jury, the issue of jury consideration of materiality had been forfeited and that the plain error rule applied. The Court of Appeals, however, considered the issue to have been preserved, and therefore, placed the burden on the prosecutor to show that the error was harmless beyond a reasonable doubt.

Whether error was harmless beyond a reasonable doubt is an issue of law. Issues of law are reviewed *de novo. People v Mass, supra,* 464 Mich at 622; *People v Krueger, supra,* 466 Mich at 53; *People v Carlson, supra,* 466 Mich at 136.

Failure to object to jury instructions will forfeit the defendant's right to appellate review of the issue absent plain error. The standard of appellate review for both unpreserved, nonconstitutional and constitutional plain error is set forth in *People v Grant*, 445 Mich 535, 552-554; 520 NW2d 123 (1994); *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). As such, there must have been error, the error must have been obvious or plain, and the error must have been decisive of the outcome of the case for the appellate court to consider the issue (unless it is the type of error in which prejudice is presumed, or reversal is automatic). The People disagree that the error in this case was plain, clear, or obvious. Rather, the People submit that no error had occurred.

B. **Discussion.**

If this Court holds that materiality is an essential element of MCL 750.422 that must be decided by the jury, then it must decide whether the trial court's failure to instruct the jury on the element of materiality was either plain error (assuming the defendant failed to object at trial) or was harmless beyond a reasonable doubt (assuming that defendant had objected at trial). The Court of Appeals erroneously proceeded on the assumption that defendant had preserved an objection at trial.

1. **Plain error.**

The Court of Appeals perfunctorily assumed that defendant preserved an objection to the trial court's failure to instruct the jury on materiality:

> In the present case, the trial court ruled before trial that defendant's alleged statements concerned a material matter. In instructing the jury on the elements of perjury, the trial court made no mention of materiality **(despite defense counsel's efforts to include the issue in the instructions)**, and the jury did not decide the matter. [254 Mich App at 252; 9a] (Emphasis added)

Contrary to the assumption by the Court of Appeals, the defendant should not be found to have properly objected to the failure to submit the element of materiality to the jury.

At several points during the proceedings the defendant moved for dismissal of the charges because the matters on which she had allegedly given false testimony were not "material" to the proceedings in which the testimony was given. The judge ruled that the testimony was material as a matter of law and that no further argument on that issue was necessary (Motion to Quash Transcript, pp 3-4; 26-27a.) The defendant did not object to the court's plan to instruct the jury on CJI2d 14.1—which does not submit the issue of materiality to the jury—and she did not offer a proposed instruction on materiality. She did, however, propose a specific intent instruction under CJI2d 3.9 that merely added the words "on a material matter." The proposed instruction read:

> For the crime of perjury this means that the prosecution must prove that the defendant intended to make false statement under oath **on a material matter** by testify that she had not been served with divorce papers and/or that she had no knowledge that there was a divorce pending. (Emphasis added) (46a).

The prosecutor objected to defendant's proposed instruction because it included the language "a material matter," and the trial court struck that language from the proposed instruction because "[t]hat is an issue of law for the Court which I have already decided, so that would not be appropriate." (T II, 315-316; 48a.) The trial court then decided to accept the prosecutor's proposed specific intent instruction on CJI2d 3.9. (T II, 315-316; 48a.), which read:

> . . . that the defendant intended to falsely testify that
> a) she had not been served with divorce papers,
> b) and/or she had no knowledge that there was a divorce pending. [47a]

That was the extent of the defendant's attempt to instruct the jury on materiality. The defendant neither offered other instruction on a definition of materiality nor tried to have the trial

court instruct the jury that materiality is an element of the offense of perjury that they need to find beyond a reasonable doubt. After the trial court instructed the jury, and read CJI2d 14.1 (which omitted any reference to materiality), the trial court asked defense counsel if she was satisfied with the court's instructions (beyond the previous exceptions taken), to which she replied in the affirmative. (T II, 362; 54a.)

The People submit that the mere inclusion of the phrase "a material fact" without more in an instruction on specific intent (CJI2d 3.9), rather than modifying CJI2d 14.1, is wholly insufficient to preserve a claim that the jury should have been told that they must find that defendant made a false statement that was material to a court proceeding, that the statement must have been one which, if believed, could have altered the course or outcome of such proceedings, and to make such finding beyond a reasonable doubt. See prior version of CJI2d 14.1 that did include instruction on materiality for the jury to consider. CJI 14:2:01.

The defendant's lack of proper objection to the trial court's failure to submit the element of materiality to the jury subjects this Court's review under the Plain Error Doctrine. *People v Carines*, 460 Mich 750, 765-766; 597 NW2d 130 (1999) is particularly instructive here, because it discussed *Johnson v United States*, 520 US 461, 465-67; 117 S Ct 1544; 137 L Ed 2d 718, (1997), a case in which the defendant argued that the trial court's failure to instruct the jury on the element of materiality in a perjury trial was structural error requiring automatic reversal. The United States Supreme Court applied the plain error doctrine to defendant's claim of instructional error:

> In applying the plain error rule to claims of unpreserved, constitutional error, we find instructive *Johnson v United States*, 520 US 461; 117 S Ct 1544; 137 L Ed 2d 718 (1997). In *Johnson*, the trial court had failed to submit the element of materiality to the jury in the petitioner's perjury trial. 520 US at 463-464. The petitioner, however, had not preserved the issue at trial. *Id.*, p 464. The United States Supreme Court, in a virtually unanimous decision,[10] applied the plain error doctrine to the petitioner's claim of instructional error. 520 US at 465-

> 470. The Court concluded that the first two requirements for avoiding forfeiture were met, i.e., plain error occurred. 520 US at 465-468.[11] The Court, however, declined to decide whether the petitioner had satisfied the third requirement, i.e., that the error affected substantial rights. 520 US at 468-469. Nevertheless, the Court questioned the petitioner's claim that the error was so serious as to defy harmless-error analysis, noting that so-called "structural errors" are found in a very limited class of cases. Id.[12]
>
> The Supreme Court determined in *Johnson* that, even if the third requirement had been met, it would not correct the error because it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Id.,* pp 469-470. In reaching this conclusion, the Court ruled that the evidence of materiality was overwhelming and the issue had been uncontroverted at trial and on appeal. *Id.,* p 470. *Johnson* is persuasive in applying the plain error standard of review to constitutional error, including instances where the alleged error is the failure to instruct the jury on an element of the offense. [footnote omitted]

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[10] Justice Scalia joined all but two sections of the opinion.

[11] The Court rejected the petitioner's claim that the error was "structural" and fell outside the scope of the plain error rule, noting that "the seriousness of the error claimed does not remove consideration of it from the ambit of the [rule]." *Id.*, p 466.

[12] The Court recently answered the question left open by *Johnson, supra*, in *Neder v United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), holding that an instructional error involving the omission of an element of an offense is subject to harmless-error analysis.

To establish plain error, a defendant must show (1) that an error occurred in the trial court; (2) that the error was plain, i.e., obvious or clear; (3) that the error affected defendant's substantial rights; and (4) that this adverse impact seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Johnson v United States, supra* at 465-67.

It could be argued that failure to submit the element of materiality to the jury was clear error because *Gaudin* was decided in 1994, and the instant perjury trial was held in 2000. According to *Johnson v United States, supra*, 520 US at 468, it is sufficient for the plain error doctrine that the error be plain at the time of appellate consideration, rather than only at time of trial. The trial court utilized the Standard Criminal Jury Instructions in effect in 2000, which

instruction had not amended CJI2d 14.1 to reflect the *Gaudin* decision at the time of the instant trial and also presently.

The People submit, however, that the defendant has not established that the error complained of has affected her "substantial rights." The burden of proving whether substantial rights are affected rests with the defendant. *Carines* at 763. To meet her burden of proving that the error affected her substantial rights, the defendant must establish that the error complained of was prejudicial, i.e., that the error affected the outcome of the proceedings. *Id.*

Even if a defendant meets these prerequisites, the reviewing court must still exercise its discretion in correcting the error:

> Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Carines* at 763, quoting in part *United States v Olano*, 207 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993)]

There is no reasonable theory on which a properly instructed jury might have made a determination that the defendant's false statements were not material. For purposes of a perjury conviction, a materially false statement is one that "could have affected the course or outcome of the proceeding." *People v Jeske,* 128 Mich App 596, 603; 341 NW2d 778 (1983). This rule is consistent with the definition of "material" in *Gaudin*: "The statement must have a 'natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Gaudin*, 515 US at 509 (quoting *Kungys v United States*, 485 US 759, 770; 108 S Ct 1537; 99 L Ed 2d 839 (1988)).

In this case, the defendant's husband obtained a default judgment of divorce and defendant brought a motion to set aside the judgment pursuant to MCR 2.612, which provides for relief from a judgment or order under certain circumstances. Two such grounds for relief

under the rule is that a "judgment is void" (due to lack of personal or subject matter jurisdiction) and that a defendant over whom personal jurisdiction was acquired "did not in fact have knowledge of the pendency of the action." MCR 2.612(B) and (C)(1)(d). The defendant testified at the motion hearing that she had not been served with divorce pleadings and did not know that a divorce was pending prior to entry of the default judgment. Copies of defendant's motion to set aside the default judgment and her testimony at the hearing on the motion to set aside the default were made part of the record at both the preliminary examination and the trial of the perjury charge (PET 4-7; 22-25a; T I 123-124; 33-34a).

Clearly, the defendant's denial of service or knowledge of the divorce proceeding was capable of "affect[ing] the course or outcome" of the hearing on the motion to set aside the default. If the judge had believed defendant's testimony, that testimony would have divested the court of jurisdiction over the very case it was hearing. Under these circumstances, no reasonable juror could find that defendant's fabrication about her lack of service was not a material matter.

Contrary to defendant's position, whether or not the judge actually believed and relied upon defendant's testimony to set aside the judgment is irrelevant, so long as the testimony at least "could have" affected the jury's decision. The test of materiality is whether a false statement can influence the tribunal—not whether it does. *State v Rollins, supra*, 264 Kan at 471. According to *Jeske*, however, it is not essential to materiality that the false statement be dispositive of an issue or case. As long as the testimony "could have" affected the judge's decision, the *Jeske* definition is met. *Jeske, supra*, 128 Mich App at 603.

Accordingly, there is no basis on this record for concluding that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v Johnson, supra*, 520 US at 469-470. The evidence of materiality was overwhelming and essentially uncontroverted. *Id.*, at 470. The jury had found beyond a reasonable doubt that

defendant had willfully sworn falsely when she testified at the divorce proceedings, and had filed an affidavit, that she was never served with a divorce complaint and had no actual knowledge of the divorce proceeding. It is uncontroverted that defendant's assertions could have divested the divorce court of jurisdiction, and thus "could have affected the course or outcome of the proceedings." *Jeske, supra*. The defendant's only defense, on the other hand, was to show that the divorce court's decision to set aside the default judgment did not ultimately rest on the fact to which she swore falsely. This, however, is not a defense to a charge of perjury.

2. **Harmless beyond a reasonable doubt.**

This Court alternatively could determine that the defendant had properly preserved an objection to the trial court's failure to instruct the jury that materiality is an element of the offense of perjury that the prosecutor must prove beyond a reasonable doubt. If so, then the appropriate standard of harmless error review for preserved constitutional error is whether the failure to instruct the jury is harmless beyond a reasonable doubt. The omission to instruct the jury on an essential element of the offense is an error of constitutional magnitude, but not structural in nature. *Carines, supra*, at 761, 765. Therefore, the standard of review for the harmless error test for preserved constitutional error (not of a structural defect) is that "the reviewing court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt." *Id.* at 774 (appendix), citing *People v Anderson (After Remand)*, 446 Mich 392; 521 NW2d 538 (1994).

The Court of Appeals' treatment of this issue was cursory, consisting of only one paragraph. The paragraph begins with the conclusory statement that "[i]n the instant case, the jury could well have decided to regard the subject matter of defendant's' alleged misstatements as immaterial."

The next sentence summarizes the proceedings in the divorce case:

> The trial court indicated that it was "not convinced" that defendant's statements were false; and apparently set aside the default under a general sense of fairness pursuant to MCR 2.612(C)(f) ("[a]ny other reason justifying relief"), expressing concerns about the general disfavoring of defaults, the short life of the default in question, and the lack of a custody decision on its merits. [254 Mich App at 252; 9a.]

The Court of Appeals then erroneously concludes the paragraph stating, "a jury could have found defendant's assertions that she lacked notice **did not affect the outcome of the motion to set aside the default**." (Emphasis added). That language misstates the test. The test is not whether the false testimony in fact affected the course or outcome of the proceedings. The test is whether it *could have* had that effect. *People v Jeske*, *supra*, 128 Mich App at 603. Indeed, later in the opinion where the panel held that the district and circuit judges did not err in denying defendant's various motions to dismiss at preliminary examination, to quash bindover, and to direct a verdict, the panel acknowledges this very distinction, but uses the correct test! 254 Mich App at 253; 10a ("Defendant asserts that the trial court did not rely on her testimony in deciding to set aside the default. However, at issue is whether the allegedly false testimony could have affected the outcome, not necessarily whether it actually did so," citing *Jeske, supra*).

The transcript of the divorce case motion hearing was attached to several of the pretrial motions in the district court and circuit court, concerning the issue of whether the false statements were material matters as a question of law to be decided by the trial court. The divorce court's ruling began at page 35 (16a). Pages 35 though 39 can be found in the People's appendix. (16-20a). The divorce judge's introductory comments were: "Well, my inclination would be to set aside the default, to be honest. It's only ten days old. Some question in my mind—probably not a question in my mind whether she might have known what was going on, but ...". The Court of Appeals erroneously interpreted this statement as the divorce trial judge's

view that he was not convinced that she had testified *falsely*. The People submit that this language suggests the opposite—that the judge was in doubt as to her *truthfulness* concerning lack of service, "but" was going to nevertheless set the default aside.

This interpretation is reinforced by the judge's statement at page 38 (19a) that "the mother ought to have known that there was a divorce going on" (and that she was therefore not being truthful when she said that she had not been served and had no knowledge of the divorce proceedings). However, the judge was "not convinced" (not sure that she actually knew). In any event, whether the divorce judge actually believed defendant's statements or not is of no consequence. The jury in the perjury trial determined that the defendant in fact made willful false statements.

The People submit that a lay person of average intelligence would readily know that: 1) divorce cases are judicial proceedings; 2) service of process is an important aspect of judicial proceedings; 3) a claim that service had not been accomplished and that the moving party had no actual notice of the divorce proceedings, if true, would weigh heavily in favor of granting a motion to aside a default judgment of divorce. Concepts of simple fairness would compel the conclusion that a party without service and without knowledge of the proceedings should not suffer the consequence of an adverse judgment entered by default, and that it would be highly likely that testimony in support of that position **could** affect the course and outcome of proceedings to set the judgment aside.

Finally, a lay jury considering materiality would be instructed that a person who claims lack of notice of a proceeding at which a judgment is entered is allowed, up to one year after entry of an adverse judgment, to move the court for relief from that judgment, MCR 2.612. It would be obvious to that jury that the issue of notice, or lack of notice, would be pivotal to that proceeding, and testimony concerning lack of notice would be significant. Clearly, such

testimony "could" impact the course or outcome of that proceeding for relief from the judgment. Any doubt in that regard would not be a reasonable doubt.

CONCLUSION

Materiality is not an element of the Michigan perjury statutes, MCL 750.422 and MCL 750.423. Both statutes are unambiguous. The common law does not remain in force where it has been changed by a statute. The judiciary was therefore without authority to revise the statutes to read the element of "materiality" back into them. The decision in the Court of Appeals below holding that materiality is an essential element of MCL 750.422 that must be decided by the jury

Alternatively, if this Court determines that the defendant properly preserved an objection to the trial court's failure to instruct the jury on materiality, then the test for harmless error is whether the prosecution established that the error was harmless beyond a reasonable doubt. The People submit that no reasonable juror could conclude that the defendant's willful false statement could not have affected the course or outcome of the defendant's motion to set aside the default judgment, and ultimately the default divorce judgment as well.

RELIEF SOUGHT

WHEREFORE, for all the foregoing reasons, plaintiff-appellant respectfully requests that this Honorable Court reverse the Court of Appeals and affirm the defendant's conviction.

Respectfully submitted,

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